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IN THE

Supreme Court of the United States

PHILIP MORRIS USA,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief *amicus curiae* in support of petitioner. Letters of consent have been filed with the Clerk.[1]

INTEREST OF AMICUS CURIAE

The Chamber is the nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 business and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The Chamber is filing this brief in support of petitioner because the rational and equitable administration of punitive damages is a matter of profound concern to the Chamber's members. The Chamber's members welcomed this Court's decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), which they viewed as providing valuable guidance on the scope of conduct for which punitive damages may be imposed. Many state and lower federal courts, however, have failed to adhere to the principles set forth in those decisions and in the other punitive damages cases decided by this Court. The decision of the Oregon Supreme Court in this case is illustrative of the problem. The Chamber submits that reversal of that deci-

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[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. No person or entity, other than the Chamber and its members, made a monetary contribution to the preparation and submission of this brief.

sion, and a firm resolution of the two issues on which certiorari was granted, will bring much-needed clarity to key principles governing the administration of punitive damage awards in federal and state courts throughout the nation.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In addition to reviewing punitive damages awards for substantive excessiveness, the Court's punitive damages opinions have long "strongly emphasized the importance of the procedural component of the Due Process Clause." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994). These opinions express special concern with the problem of inadequately guided juries, which invites "extreme results that jar one's constitutional sensibilities." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). Absent sufficient guidance on how to determine appropriate punitive awards, juries can do "little more than . . . what they think is best," and are "left largely to themselves in making this important, and potentially devastating, decision." *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring). In particular, the failure to tether a jury's discretion closely to the proper function of punitive damages creates a grave risk that they "will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Oberg*, 512 U.S. at 432. Accordingly, this Court has long emphasized the importance of providing "adequate guidance" to jurors charged with the societal function of meting out civil punishment on behalf of the community. *Haslip*, 499 U.S. at 18; *see State Farm*, 538 U.S. at 418.

More recently, this Court has expressed concern with the practice of using a single-plaintiff lawsuit as a vehicle for punishing a defendant broadly for uncharged, unadjudicated conduct. *See State Farm*, 538 U.S. at 422-23. That is precisely what happened in this case. The trial court, ignoring

this Court's decision in *State Farm*, and failing to provide the jury with proper guidance, allowed the jury to consider hypothetical, unadjudicated harm to non-parties in deciding the amount of punitive damages to award respondent. Thus unmoored from the facts and conduct at issue in respondent's own case, the jury – quite predictably – awarded punitive damages in an amount out of all reasonable proportion to the compensatory damages awarded to respondent.[2]

The Oregon Supreme Court not only failed to correct that procedural error, but instead compounded the error, by failing to hew closely to a key punitive-damages rationality guidepost reaffirmed by this Court in *State Farm*. *See* 538 U.S. at 425. That guidepost requires a reasonably close ratio between the amount of punitive damages awarded and the amount of compensatory damages awarded, thereby ensuring that a given punitive damages award bears a reasonable relationship to the harm caused to the particular plaintiff in the case. The ratio guidepost thus works hand in glove with *State Farm*'s prohibition against punishment for unadjudicated harms to non-parties – absent serious enforcement of the ratio guidepost, there can be little assurance that an outsized punitive damages award does not reflect *sub silentio* punishment for unproven harms to non-parties.

As a matter of basic procedural due process, it is critical that courts give jury instructions that provide adequate guidance both as to the prohibition against punishment for unadjudicated harms and as to the proper ratio limits on punitive damages. Absent proper guidance on these points, defen-

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[2] The punitive damages award of $79.5 million was almost 97 times the $821,485 in compensatory damages awarded by the jury for wrongful death, and 152 times the $521,485 statutory maximum for wrongful death damages applicable here. *Cf. State Farm*, 538 U.S. at 426 ("courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm *to the plaintiff* and to the general damages recovered") (emphasis added).

dants involved in mass-tort-type litigation will be denied a reasonable opportunity to defend themselves in individual cases and will be subjected to multiple punishment for the same harms. And because of innate cognitive limitations on jurors' ability to assign coherent dollar values to blameworthy conduct – limitations demonstrated in important social science research conducted within the last decade – juries deprived of this guidance are forced to issue punitive damages awards on an essentially random basis.

If the due process to which all defendants are entitled means anything, it must bar the deprivation of property through procedures that demonstrably guarantee erratic and unpredictable results in comparable cases. Juries must be instructed to limit punitive damages awards to the amount necessary to punish the defendant for the harms caused to the plaintiff, and to limit such awards to a reasonable relationship to such harm, as reflected in a confined ratio between the punitive and compensatory awards.

ARGUMENT

I. PERMITTING JURIES TO PUNISH DEFENDANTS FOR UNADJUDICATED HARM TO NON-PARTIES VIOLATES PROCEDURAL DUE PROCESS

The Oregon Supreme Court squarely held that a defendant may be punished not only for conduct that injured the plaintiff, but also for conduct that injured others not before the court. In the Oregon Supreme Court's words, the massive award was justified because "Philip Morris harmed a much broader class of Oregonians," Pet. App. 23a, and "the jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large." Pet. App. 18a.

The Oregon Supreme Court's holding that a punitive

damages award may be based on unadjudicated harm to non-parties directly conflicts with this Court's admonition in *State Farm* that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 538 U.S. at 423. Recognizing that a "defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business," *id.*, this Court rejected the idea that a defendant could be punished for conduct to individuals not before the court, *see id.* at 421 ("Any proper adjudication of conduct that occurred . . . to other persons would require their inclusion.").

As elaborated below, allowing jurors to impose punitive damages for harm to non-parties raises at least two serious procedural due process concerns: the defendant is (1) deprived of its right to mount a defense to non-parties' claims, and (2) exposed to a substantial risk of multiple punishment for the same conduct. These due process concerns can be mitigated only through a clear instruction prohibiting the jury from punishing the defendant for harm to non-parties–the very type of instruction petitioner sought and was denied in this case.

A. Punishing A Defendant For Harm To Non-Parties Denies The Defendant Its Due Process Right To Defend Claims Against It

By permitting the jury to punish petitioner for harm to non-parties, the trial court allowed respondent's lawsuit to become a vehicle for vindicating the rights of a "broader class of Oregonians" purportedly harmed by petitioner's conduct. Pet. App. 23a. In other words, the court effectively turned this individual case into a *de facto* class action, without the *de jure* procedural protections deemed essential to the fair deployment of the class action device.

The class action procedure was devised to allow the

claim of a single plaintiff to represent the claims of hundreds or thousands or millions of other individuals, but only when the representative plaintiff's claim has so much in common with all the other claims that the defendant fairly can be made simultaneously liable (or absolved of liability) to all claimants in a single, all-or-nothing proceeding. *See Developments in the Law – Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 877, 936-38 (1958). The due process risk inherent in such a proceeding is self-evident: if the class representative's claim is not typical of the other claims or if the class members' claims differ materially among themselves, proceeding on a representative basis will almost certainly deny the defendant its right to mount a full and fair defense against each individual claim. *See Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998).

The very essence of due process, of course, is the right to be heard before a judgment may be entered for or against a party. *See Boddie v. Conn.*, 401 U.S. 371, 377 (1971) ("due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"). This includes the "'opportunity to present every available defense.'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); *accord Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1938). Accordingly, standard class action rules preclude class litigation on behalf of absent parties *unless* the plaintiff first proves that all such parties are situated so similarly that litigation of one claim is effectively and fairly the litigation of all other claims as well.

It is impossible to contend that this case could have satisfied the requirements for proceeding as a class action, given that each claimant would be required to prove the extent of his or her personal reliance on various statements made by petitioner over the course of many years (most of which respondent's husband never heard or was exposed to). Indeed, the courts have uniformly denied class certification in other tobacco-safety-misrepresentation cases for precisely that reason. *See, e.g.*, *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996); *Estate of Mahoney v. R.J. Reynolds Tobacco Co.*, 204 F.R.D. 150, 154 (S.D. Iowa 2001); *Badillo v. Am. Tobacco Co.*, 202 F.R.D. 261, 264 (D. Nev. 2001); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 492 (S.D. Ill. 1999); *Small v. Lorillard Tobacco Co.*, 679 N.Y.S.2d 593, 599 (App. Div. 1998), *aff'd*, 698 N.Y.S.2d 615 (1999).

Respondent in this case nevertheless was effectively allowed to circumvent basic class action requirements – and the due process protections they are designed to provide – by proceeding with her case individually and then seeking punishment on behalf of what the Oregon Supreme Court referred to explicitly as a "broader *class* of Oregonians." Pet. App. 23a (emphasis added). That approach plainly denied petitioner any opportunity to challenge the existence, cause, or magnitude of any supposed injuries of the non-parties – overlooking the obvious possibility that many of the other ostensibly injured non-parties "may not have been able to establish specific elements – or that the defendant may have been able to establish unique affirmative defenses – related to their individual claims." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 601 (2003). Indeed, the non-parties were not even identified at trial, making it literally impossible for petitioner to defend against their claims, which thus remained purely hypothetical for purposes of assessing punitive damages. The

due process violation could hardly be more flagrant:

> If due process will not permit a defendant to be tagged with compensatory damages for the wrongs that it visited upon a large number of people without being afforded the opportunity to contest individual elements of each alleged victim's claim and to raise victim-specific affirmative defenses, it cannot tolerate the imposition of punitive damages in these circumstances, especially given that punitive damages for each wrong are expressly contingent upon an entitlement to compensatory damages. The defendant can be punished through the mechanism of punitive damages for the harm caused to third parties only if it committed legal wrongs against all of those parties. The only way to establish that it did so is through individual tort suits (or a collective proceeding in which the defendant is afforded the opportunity to defend against each allegation), not litigation in which the plaintiff effectively strips the defendant of all of its defenses.

Id. at 657.

In any other legal context, the suggestion that due process allows a person to be punished by a court for unproven, unadjudicated conduct affecting unidentified non-parties would be met with derision. This approach not only violates due process, it contradicts the most basic Anglo-American understanding of the judicial function, which is "intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 & n.10 (1974). The judicial function stands in "sharp contrast" to the *legislative* role, *id.*, which is to address the general welfare of the broader public. "Unlike a legislature, whose judgments may be predicated on educated guesses and need not necessarily be grounded in facts adduced in a hearing . . . a jury is bound to consider only evidence presented to it in arriving at a

judgment." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 468 (1993) (Kennedy, J., concurring). Thus, when individual courts and lay juries are called upon to issue broad, quasi-legislative pronouncements on matters they have not adjudicated – and could not rationally adjudicate in a single judicial proceeding – they are performing a function they simply are not designed or equipped to handle. It should come as no surprise when such proceedings produce arbitrary and irrational results, as they so often do. *See Gore*, 517 U.S. at 596 (Breyer, J., concurring) (when juries are asked "to create public policy, and to apply that policy, not to compensate a victim, but to achieve a policy-related objective outside the confines of the particular case," there is a "substantial risk of outcomes so arbitrary that they become difficult to square with the Constitution's assurance, to every citizen, of the law's protection"); *see also infra* Part II (describing sociological research demonstrating cognitive limitations on jurors' ability to adjudicate punitive damages rationally).

This case illustrates the point. The jury below, denied the guidance necessary to understand how it should limit a punitive award to address only the harm at issue in respondent's case, issued an award that far exceeded any constitutionally reasonable amount for the conduct actually adjudicated in respondent's case. *See supra* note 2 (noting highly disproportionate ratio of punitive damages to compensatory damages); Pet. 1-2 (describing undisputed facts establishing that decedent was aware of risks associated with cigarette use). And unless the decision below is reversed, it will *necessarily* lead to other such indefensible awards, as other plaintiffs' lawyers follow the decision's lead and invite juries to punish defendants for unproven, unadjudicated harms to non-parties. The excessive and irrational awards that will inevitably result will place greater strain not only on the defendants unfairly subjected to such awards, but also on the increasingly challenged capacity – and credibility – of the

nation's civil justice system.

B. Punishment For Harm To Non-Parties Also Invites Unjust And Socially Wasteful Multiple Punishment

The *de facto* class action punitive damages award issued below also subjects petitioner to the direct and substantial risk of being punished repeatedly for the exact same conduct causing the exact same harm to the exact same people. Although the award in this case was unambiguously intended to punish petitioner for harms it caused to non-parties, nothing prevents those non-parties from now bringing their own actions seeking duplicative punishment for the selfsame harm. Indeed, if affirmed, the massive size of the award in this case all but guarantees that other potential claimants, for whose injuries petitioner was already punished, will file their own lawsuits seeking to collect their own payouts for the harms to a "broad[] class of Oregonians." Pet. App. 23a.

An essential function of a true, *de jure* class action is to ensure that, when a classwide proceeding is appropriate, a judgment for or against the defendant will preclude subsequent actions by class members seeking to establish the same liability. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985). The *de facto* class punishment imposed below affords no such protection. "Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff . . . deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure." *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004). The law of *res judicata* also affords no protection, since it binds only persons who were actually parties to a prior judgment. *See Richards v. Jefferson County*, 517 U.S. 793, 800-02 (1996). In short, as Judge Friendly observed in his seminal opinion examining the multiple punishment risk posed by punitive damage awards based on harms to non-parties, there is "no principle whereby the first

punitive award exhausts all claims for punitive damages and would thus preclude future judgments." *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

Accordingly, petitioner faces the manifestly unjust prospect of being punished, over and over again, for the same harm to the same broad class of people, essentially guaranteeing that the final tally will far exceed the maximum amount that permissibly could be imposed for such harm in any one case. *See Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 51 (Tex. 1998) ("[I]f a single punitive damages award becomes unconstitutional when it can fairly be categorized as 'grossly excessive' in relation to a state's legitimate interests in punishment and deterrence, it follows that the aggregate amount of multiple awards may also surpass a constitutional threshold.") (quoting *Gore*, 512 U.S. at 589).

It is no comfort to defendants that some jurisdictions – including Oregon – allow future juries to consider the punishment already imposed against a defendant in determining the amount of punitive damages to award.[3] Such rules simply place a defendant in the untenable position of arguing that it should not be liable or punished for alleged wrongdoing while simultaneously introducing evidence that the same conduct caused a prior jury to award large punitive damages. Logic and experience tell us that evidence of a prior large award is unlikely to persuade a subsequent jury to issue a small award or no award. As Judge Friendly observed, "we think it somewhat unrealistic to expect a judge, say in New

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[3] *See, e.g.*, Or. Rev. Stat. § 30.925(2)(g) (listing as one of many criteria for consideration in determining punitive damages award: "The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damages awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.").

Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostopowitz in New York had stripped that cupboard bare." *Roginsky*, 378 F.2d at 840. Indeed, the more likely effect is the opposite: when a defendant introduces evidence that it has already been subject to punitive damages for the same course of conduct, a jury is almost certain to use the prior award as an "anchor" for its own award or as justification for imposing an even higher punitive damages award. *See* Cass R. Sunstein *et al.*, *Punitive Damages: How Juries Decide* 216-19 (2002) ("*How Juries Decide*") (discussing empirical research demonstrating "anchor effects" in juries' punitive damages deliberation).

The reality is that permitting a defendant to be punished for collective harm to non-litigants substantially increases the likelihood that corporate defendants will be subjected to repeated – and oxymoronic – "take all" lawsuits. And the opportunity to get future "credits" certainly is of no use to a defendant that *wins* subsequent cases brought against it. Similarly, even if a defendant were to prevail in the lion's share of individual cases brought against it (and therefore be punished for harms for which another jury absolves the defendant), a single punitive award based on harm to others could essentially wipe out all of its previous or subsequent victories. This very case exemplifies that danger. Although petitioner has prevailed in numerous other lawsuits brought by individual smokers invoking theories similar to respondent's, this single verdict punishes petitioner for *all* such conduct in the State of Oregon. This approach allows a single (possibly aberrational) jury to impose state-wide sanctions against a corporate defendant for injuries that never need be proven in court. The fear of such an outcome distorts the legal process by placing "insurmountable pressure on defendants to settle . . . even when the probability of an adverse judgment is low." *Castano*, 84 F.3d at 746; *see In re*

Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298-99 (7th Cir. 1995).

This inordinate pressure to settle has severe ramifications beyond the injustice to the defendant itself. As several prominent scholars have explained, exposing companies to multiple, massive punitive damages awards can result in overdeterrence, causing firms to take precautions that may be socially wasteful. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 882 (1998); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 322-27 (1998). When the risks attending the introduction of a product or service or business practice appear unacceptably high, the prudent actor stays out of the game – to society's detriment. *See Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., concurring) (threat of enormous punitive damages awards has a detrimental effect on the research and development of new products). Although all litigation carries a risk of erroneous results, punishing an entire course of conduct on the basis of a single potentially wrongful decision inflates that risk unnecessarily, and increases the prospect that the defendant will be deterred from engaging in socially beneficial activities. *See* Colby, *supra*, at 612 n.98.[4]

The multiple punishment problem created by the approach endorsed below is thus not only a due process prob-

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[4] Permitting a single plaintiff to recover damages for purported class-wide injury also potentially deprives future plaintiffs of their own monetary recoveries. Even if a later jury is not persuaded to "discount" its own punitive award based on other punitive damages awards already imposed against the defendant, as a practical matter, the pool of money available to subsequent plaintiffs will be substantially reduced by the recovery of the initial plaintiff. *See generally Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834-42 (1999) (discussing judicial responses to "limited fund" situations in class actions).

lem – it is an economic and social problem of broad dimension. This Court should make clear that punitive damages may be awarded to punish the defendant only for harms *to the plaintiff*, and not for unadjudicated harms to non-parties.

C. Jury Instructions Of The Kind Rejected Here Are Necessary To Mitigate The Risks Of Punishing For Harm To Non-Parties

In every punitive damages case, "proper jury instruction is a well-established and, of course, important check against excessive awards." *Oberg*, 512 U.S. at 433. In the nuanced context of considering harm to non-parties, clear jury instructions are particularly important. As explained above, this Court in *State Farm* rejected the notion that juries may punish a defendant for harm to individuals not before the court. But the Court did not categorically bar all *consideration* of "other similar act" evidence; rather, the Court emphasized that such evidence might be relevant, but only to the extent that it demonstrates the "deliberateness and culpability" of the defendant's conduct. *State Farm*, 538 U.S. at 422; *see also Gore*, 517 U.S. at 574 n.21 (evidence of out-of-state sales may be "relevant to the determination of the degree of reprehensibility of the defendant's conduct" but may not be used "as a multiplier in computing the amount of [the] punitive sanction"). This distinction is critical, but there is no doubt that, absent clear guidance as to the proper role of such evidence, it is a distinction easily enough lost on lay jurors, creating a serious risk that evidence will be misused in the punitive damages determination.

The specific danger is that evidence introduced ostensibly to demonstrate the reprehensibility of the defendant's conduct toward the plaintiff will be used for the impermissible purpose of punishing the defendant directly for harm to parties not before the court. This danger is illustrated by *State Farm* itself. In that case, the plaintiffs had introduced evidence of State Farm's nationwide claims adjustment pol-

icy for the stated purpose of establishing State Farm's motive against its insured, the plaintiff in that case. 538 U.S. at 422. Notwithstanding the asserted purpose of such evidence, this Court found that the lower courts had used the "reprehensibility analysis" as a "guise" to punish the defendant for harm to non-parties. *Id.* at 423 ("Nor does our review of the Utah courts' decisions convince us that State Farm was only punished for its actions toward the Campbells.").

State Farm thus exemplifies the need to maintain, during trial and jury deliberation, a clear distinction between permissible and impermissible uses of evidence of harm to non-parties. As the Court recognized, "concerns over the imprecise manner in which punitive damages systems are administered" are "heightened when the decisionmaker is presented . . . with evidence that has little bearing as to the amount of punitive damages that should be awarded." *Id.* at 417-18. As the Court made clear, evidence of harm to non-parties has at best a limited bearing on basic punitive damages analysis. Such evidence may be relevant, for example, in a product liability case if it demonstrates the manufacturer's foreknowledge of a product's design defect.[5] Evidence of harm to others is *not* relevant to assessing the scope of the harms for which the defendant may be punished, i.e., the harms suffered by the individual plaintiff in the case.

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[5] In this context, evidence of the defendant's conduct *prior to* the specific conduct or transaction at issue may be relevant to the defendant's knowledge, while the defendant's actions subsequent to the conduct or transaction causing the plaintiff's injury would not bear on the defendant's knowledge. *See Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 451-52 (4th Cir. 2001) (reversing punitive damages award on ground that post-design evidence does not demonstrate defendant's contemporaneous knowledge of wrongdoing); *Wohlwend v. Edwards*, 796 N.E.2d 781, 787 (Ind. Ct. App. 2003) (concluding that any relevance of defendant's subsequent acts was substantially outweighed by danger that jury would use such evidence to punish defendant for his subsequent acts instead of conduct that gave rise to plaintiffs' actual damages).

Therefore, courts should exclude evidence of harm to others unless the plaintiff can explain why the specific non-party evidence at issue is relevant to assessing the degree of reprehensibility of the conduct affecting the plaintiff. Moreover, courts must be careful to balance the marginal relevance of this "reprehensibility" evidence against the danger that the jury will be confused or sidetracked by evidence concerning parties not before the court. *See* Fed. R. Evid. 403.

Where courts do admit evidence or argument concerning harm to non-parties, it is essential that they provide juries with clear instructions "to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *State Farm*, 538 U.S. at 418. In *State Farm*, this Court explicitly recognized the need to provide specific instructions to juries regarding the limited scope for which they can consider certain evidence. *Id.* at 422 ("A jury *must be instructed* . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.") (emphasis added).

In this case, despite respondent's repeated appeals to the jury to punish petitioner for the alleged harms suffered by all present and future smokers in Oregon, the trial court refused to instruct the jury that it could not punish petitioner for the effect of its conduct on non-parties. The requested instruction stated:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable conduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those

harms, as those other juries see fit.

Pet. App. 17a-18a. Delivery of that instruction may not have *guaranteed* that the jury would punish petitioner only for the harms at issue in this case, but it would at least have provided the jury with a tool necessary to the performance of its task. In this context, the trial court's failure to provide the jury with *any* guidance on the limited purpose for which it could consider injuries suffered by non-parties deprived petitioner of the minimum procedural safeguards required by due process.[6] Absent a proper instruction, an excessive award was essentially inevitable, as explained above, especially when coupled with counsel's improper argument urging the jury to impose broad punishment for unadjudicated harms to non-parties. Basic guarantees of due process – as well as concern for the rationality of our nation's system of civil punishment – require that punitive damages trials be conducted free from such outcome-determinative procedural flaws.

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[6] This conclusion is also compelled by the three-part procedural due process test prescribed in *Mathews v. Eldridge*, 424 U.S. 319 (1976). First, the "private interest" at stake (*id.* at 335) is plainly significant, as evidenced here by the jury's punitive award of $79.5 million. Second, allowing a jury to punish for unadjudicated harm to non-parties creates a severe risk of an "erroneous deprivation" (*id.*), because – as explained in the text – the jury is likely to impose punishment for conduct other juries would find non-actionable. Finally, a proper limiting instruction would entail no "fiscal and administrative burdens" (*id.*) of any kind; indeed, the State has no legitimate interest in denying an instruction and allowing punishment for unadjudicated harms. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury.").

II. DUE PROCESS REQUIRES THAT JURIES BE GIVEN ADEQUATE GUIDANCE ON THE LIMITS OF PUNITIVE DAMAGE AWARDS

The previous section demonstrated the due process risks inherent in refusing to instruct a jury not to punish the defendant for unproven harms to non-parties. Such an instruction, however, is only a starting point for due process – an absolute bare minimum requirement for a fair punitive damages trial. More is required – especially given the fundamental mismatch between what civil juries are designed to do (i.e., find historical facts and adjudicate liability) and what they are often asked to do in assessing punitive damages (i.e., assign a dollar value on behalf of the broader community to the moral blameworthiness of conduct). As discussed in this section, recent sociological research into the actual decisionmaking processes of juries deliberating about punitive damages demonstrates the randomness imbedded in the latter function – randomness that is the very antithesis of due process *of law*.

Because of that randomness, the procedures necessary to ensure that punitive damages awards result from due process must include more than a jury instruction prohibiting punishment for harms to non-parties.[7] As an additional component of procedural due process, courts also should instruct juries to confine their punitive damages awards to a reasonable multiple of the compensatory damages award, consistent with the ratio guidepost at issue in this case.

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[7] The unpredictability of punitive damages dollar awards is, of course, exacerbated when juries are asked to impose punishment for harms extending far beyond the individual harms they have adjudicated in particular cases. The research discussed below thus confirms the due process flaws addressed in the prior section.

A. The Ratio Guidepost Is A Crucial Constraint On Otherwise Random Punitive Damage Awards

The decision below holds that a reviewing court's view of the reprehensibility of the defendant's conduct can "override" the ratio guidepost requiring that the amount of punitive damages awarded bear a reasonable relationship to the amount of compensatory damages awarded. *See* Pet. App. 33a. As petitioner and other *amici* will no doubt explain, this Court's precedents – including especially *State Farm* – make clear that in cases involving substantial compensatory awards, other considerations may increase the permissible ratio of punitive to compensatory damages, but they cannot altogether supplant the ratio limitation.

The Chamber will not repeat that legal analysis; this brief instead summarizes important research into actual jury decisionmaking processes – research that starkly underscores the crucial function of the ratio guidepost in the administration of punitive damages procedures. *See How Juries Decide* x-xi, 22-25 (citing and summarizing studies). As most relevant here, that research shows that the task of assigning dollar values to the wrongfulness of various forms of conduct is a task that jurors *necessarily perform on a random basis*. It is not a matter of effort, intelligence or bad faith – the research shows instead that innate features of human cognition, combined with the individual-case nature of the civil jury function, prevent jurors from assigning dollar awards for punishment on anything approaching a rational, systematic basis. It is only by imposing upon punitive damages awards the discipline of the guideposts identified by this Court – and the ratio guidepost in particular – that courts can ensure that such awards reflect a modicum of rational, *legal* judgment about the dollar value of punishment appropriate for various types of unlawful conduct.

The recent sociological research into actual punitive damages decisionmaking began with a pair of studies exam-

ining whether jurors would – or could – award comparable dollar punishments for similar conduct. *See id.* at 31-62. The first study gave participants identical sets of ten scenarios and asked them both to rank each scenario on bounded 0-6 scales measuring relative outrageousness and severity of punishment deserved, and also to specify a dollar punishment for the conduct. The study showed consistency among participants in terms of their rankings on the bounded scales – but "severe unpredictability and highly erratic outcomes" in the dollar values each participant assigned to the conduct. *Id.* at 37.

The second study essentially repeated the first, but also sought to determine whether the process of deliberation has a moderating effect on the variability of monetized punitive damages judgments. The participants in this study were first asked to rank scenarios and assign dollar values individually, but then were grouped into approximately 500 deliberating mock juries to perform the same task. This study confirmed the first – individual participants reached widely varying judgments as to the proper dollar value to be assigned to the exact same misconduct – but also determined, perhaps surprisingly to some, that the process of deliberation actually *exacerbated* the variability of dollar awards. Even worse, the deliberating juries demonstrated a tendency to award even ***higher*** dollar awards than jurors acting alone. In other words, the deliberative process both increased the overall variability of punitive awards and shifted the range of awards higher. *Id.* at 43-61.

The researchers propose two highly plausible explanations for the demonstrated variability of assigned dollar values and the severity shift caused by deliberation. Variability, they hypothesize, results from a recognized limitation of human cognition referred to in sociological literature as "[m]agnitude scaling without a modulus." *Id.* at 41. A magnitude scale includes a "modulus" when it has a common

reference point – a recognized definition of a particular input as having a specified value, against which all other inputs can be measured. "Thus, for example, a modulus of 100 might be assigned to a noise of a certain volume, and other noises might be assessed in volume by comparison with the modulus." *Id.* Jurors asked to make a punitive damages award, however, generally lack any such modulus: they have only the individual case they have adjudicated, and a numeric range from zero to infinity. Their selection along that range of the one "proper" dollar award to be assigned for the blameworthy conduct before them is, almost by definition, arbitrary and therefore highly erratic and unpredictable.

The researchers offer a related explanation for the observed upward severity shift associated with the deliberative process. The magnitude scale of punitive damages is unbounded – but only at the high end. Once jurors collectively have decided to award a nonzero amount, individual deliberators are more likely to resolve their disagreements over the "proper" amount by tending toward the unbounded end and accepting the higher assessments made by others. *Id.* at 58.

Whatever the exact cognitive cause of the variability and severity shift in jurors' punitive damage assessments, it is empirically demonstrated – and wholly consistent with real-world experience. *See Oberg*, 512 U.S. at 433 n.11 (citing empirical evidence of varying and excessive awards); *Developments in the Law – The Paths of Civil Litigation*, 113 Harv. L. Rev. 1752, 1783 (2000) (citing punitive damages verdicts). Defenders of punitive damages point out – correctly – that trial and appellate courts often reverse or reduce large punitive damages awards, *see, e.g.*, Theodore Eisenberg *et al.*, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 Cornell L. Rev. 743, 777-78 & n.123 (2002), but this observation only underscores the point made here: unless juries are properly guided *ab initio* or constrained *post hoc*, they will *inevitably* issue awards that are

arbitrary, erratic and unpredictable in amount. But in our constitutional system, a person may be deprived of property only through due process *of law* – not through a process that assigns property deprivations on a literally random basis. The ratio guidepost provides in each case a measure of the certainty and predictability that fundamentally distinguishes "law" from arbitrary or capricious governmental conduct.

B. The Ratio Guidepost Should Be Used To Guide Juries *Ab Initio*, Not Just Constrain Their Judgments *Post Hoc*

As it is now beyond reasonable dispute that inadequately guided juries produce effectively random punitive damages judgments, the question remains – what, if anything, can be done about it? This Court has answered that question repeatedly, first in *Gore*, reaffirmed in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) and again in *State Farm*: the due process clause requires courts reviewing punitive damages awards to engage in a substantive, *post hoc* review of the size of punitive damages awards to ensure compliance with constitutional limitations.

The Chamber fully endorses that approach, but there is an additional step courts could and should take – one focused more on the "procedural component of the Due Process Clause" as implicated by punitive damages trials. *Oberg*, 512 U.S. at 420. As discussed above, it should be clear that procedural due process requires that juries be instructed not to punish a defendant for unadjudicated harm to non-parties. The Chamber submits that procedural due process dictates the same approach for the reasonable relationship/ratio guidepost. Although juries literally cannot assign punitive damage dollar awards on an *unbounded* scale in any rational or systematic way, if the scale were *bounded* – either by specific ratio limits, or at least by an admonition to ensure that the amount of punitive damages awarded bears a reasonable relationship to the amount of compensatory damages

awarded – then jurors could approach their task more rationally from the outset, seeking to identify where the defendant's conduct falls along a cognizable *range* of potential monetary punishments.

This approach would not supplant subsequent de novo appellate review of punitive damages awards, for the point is not necessarily to dictate the outermost *constitutional* ratio and then let the jury choose any amount within that range. It is, rather, simply to promote a more rational decisionmaking process, both (a) by tethering the jury's discretion to the harm involved in the case before it, and (b) by reducing to manageable proportions the scale on which jurors may assign dollar values to the harm they have adjudicated. If jurors select a value on that scale that is not justified, as a matter of law, by the reprehensibility of the conduct and/or by comparable civil penalties, then the appellate court can and must still reduce the award. But by introducing the ratio guidepost as a guide for the jury's deliberative process, courts can better ensure that the process itself is more rational and less random – closer to the *due process of law* to which all punitive damages trials must adhere.

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioner, the decision below should be reversed.

Respectfully submitted,

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